dial or of even substantive right. The state cannot properly be said to have a vital interest in having litigation between its citizens determined solely by the common law of the state. Mere disparity of remedies or difference of substantive law is an insufficient consideration for interfering with a case before a court which, it must be assumed, will make just disposition of the controversy. The balance of convenience is against enjoining, since there is no inequity in the defendant's merely seeking a more favorable forum. Some courts, however, are not in accord with this view and treat these cases no differently from those discussed above. Thus, a tort suit in Georgia was enjoined by an Alabama court on the ground that the Georgia court would refuse to apply the Alabama rule relative to contributory negligence and thereby deprive the complainant of a defense to which he was entitled.[14] In another case, the court improperly enjoined an action when it did not even appear that the defense of failure of consideration could not be set up as well before the foreign tribunal.[15] A recent case goes even further. In *Culp* v. *Butler* [16] an Illinois action was enjoined by the Indiana court, because the defense of the Statute of Limitations, which the complainant could plead in Indiana, would not avail him in Illinois.[17] The court obviously confuses barring the right with barring the remedy; the substantive right still subsists, but the domestic court simply refuses a remedy thereon. It is therefore difficult to perceive why the application to a forum that *will* grant the defendant a remedy constitutes an evasion of the home law, for admittedly there is a good cause of action. An Illinois decision is directly opposed to that of the principal case on the exact point discussed above,[18] and on the general principle involved, the weight of authority is also against it.[19] It is submitted, that the true rule in this class of cases should be that only suits prosecuted to evade a strong domestic policy should be restrained.

EFFECT OF FEDERAL POSSESSION AND CONTROL OF INSTRUMENTALITIES OF INTERSTATE COMMERCE ON THE POWER OF THE STATES. — Two recent decisions of the United States Supreme Court are interesting as new monuments on the vexed boundary line dividing federal from state power. In *Northern Pacific Ry. Co. et al.* v. *North Dakota*[1] the court held that under the war legislation of Congress [2] the Director General of

[14] Weaver *v.* Ala. G. S. R. Co., 76 So. (Ala.) 364 (1917).

[15] Sandage *v.* Studabaker, *supra*. See also Dinsmore *v.* Neresheimer, 32 Hun (N. Y.), 204 (1882).

[16] 122 N. E. (Ind.) 684 (1919).

[17] It is difficult to see how the facts in the case raised the question of law upon which the court bases its decision. Presumably the defendant brought his action, before the Statute of Limitations had run in either state. The complainant waited until the limitation period had run in Indiana and then filed his bill there to enjoin. Clearly, under no view was there an attempt to evade the Indiana law.

[18] Thorndike *v.* Thorndike, 142 Ill. 450, 32 N. E. 510 (1892).

[19] Edgell *v.* Clarke, 19 App. Div. 199, 45 N. Y. Supp. 979; Bigelow *v.* Old Dominion, etc. Co., 47 N. J. Eq. 457, 71 Atl. 153 (1908); Carson *v.* Dunham, 149 Mass. 521, 20 N. E. 312 (1889); Illinois Life Ins. Co. *v.* Prentiss, 277 Ill. 383, 115 N. E. 554 (1917); Am. Exp. Co. *v.* Fox, 187 S. W. (Tenn.) 1118 (1916); Federal Trust Co. *v.* Conklin, 87 N. J. Eq. 185, 99 Atl. 109 (1916); Wade *v.* Crump, 173 S. W. (Texas) 538 (1915).

[1] U. S. Sup. Ct. No. 976, October Term, 1918.

[2] 39 STAT. AT L. 645; 40 STAT. AT L. 451.

Railroads has power to fix intrastate rates. It was likewise decided, in *Dakota Central Telephone Co. et al.* v. *South Dakota*[3] that under other but similar legislation[4] the Postmaster General can regulate intrastate telephone and telegraph rates.[5] That such powers could be exercised by the United States under appropriate legislation by Congress was not seriously disputed on the part of the states. The question principally agitated was whether, in view of the peace-time power of the states to control these rates and in view of expressions in the acts of Congress that nothing therein should be construed to impair or affect the existing police regulations of the several states, the federal executives had Congressional sanction for their interference.[6]

It has been held that where there is a federal incorporation of a railroad company under the interstate commerce power it is to be presumed, in the absence of express enactment to the contrary, that the corporation is intentionally left subject to state control in matters of taxation, rates, and police regulation.[7] Where a new entity is created which must, in the nature of things, be subject to some control as to rates, etc., and Congress has provided none, this presumption is sound. When, however, the federal government itself takes possession of property and undertakes to manage it, there is no room for such a rule of construction. Congress gave the President extended powers in order that the war emergency might be handled with dispatch. When the provisos saving "the lawful police regulations" of the several states are read in the light of this fact, "police regulations" can only mean the police power of the states in the limited sense of the phrase which designates the power to regulate concerning the safety, health, and morals of the public.[8] On the question of the true construction of the acts of Congress the cases consequently appear to have been well decided.[9]

In the joint resolution of the 16th of July, 1918, by which Congress authorized the President to take possession and assume control of the telephone and telegraph systems, no express authority to fix rates is found.[10] The railroad legislation in terms gave the President this power,

[3] U. S. Sup. Ct. No. 967, October Term, 1918. See RECENT CASES, p. 115. Mr. Justice Brandeis dissented. [4] 40 STAT. AT L. 904.

[5] Similar cases originating in other states and disposed of on the same principles are: Burleson *v.* Dempsey, U. S. Sup. Ct. No. 1006, October Term, 1918; Macleod *et al.* *v.* New England Telephone and Telegraph Co., U. S. Sup. Ct. No. 957, October Term, 1918.

[6] In the legislation concerning both the railroads and the telephone and telegraph systems the language saving the police regulations of the states is substantially the same: In the first case it reads: ". . . nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds." The telephone legislation only substitutes "transmission of Government communications" in place of "transportation of troops, war materials, Government supplies."

[7] Reagan *v.* Mercantile Trust Co., 154 U. S. 413 (1894).

[8] State *v.* Wisconsin Telephone Co., 172 N. W. (Wis.) 225. See FREUND, POLICE POWER, § 10.

[9] See Henry Wolf Biklé, "State Power over Intrastate Railroad Rates During Federal Control," 32 HARV. L. REV. 299. The writer interprets the act of Congress of March 21, 1918 (40 STAT. AT L. 451), and forecasts correctly the result of cases arising thereunder.

[10] 40 STAT. AT L. 904.

and by implication gave him the power to exclude rate-making by the states. In the Dakota Central Telephone case the states were not so deprived of their authority to fix intrastate rates unless by necessary implication arising from the fact that the federal government took possession and control. Chief Justice White expressed the problem in these words: "Conceding that it was within the power of Congress, . . . to transplant the state power as to intrastate rates into a sphere where it, Congress, had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency, it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States. . . ." If political developments are to be in the direction of government ownership or operation of the instrumentalities of interstate commerce, this suggestion that the relation of the states to interstate commerce will be determined by different principles from those heretofore applied when such commerce was exclusively carried on by private persons and corporations is of considerable interest. As in the past, there will be two principal points of contact: (1) state taxation; (2) state police power.

It has been argued with force that Congress has the power to enjoin all state taxation and control of property engaged in interstate commerce.[11] But in the absence of plain words from Congress the states have enjoyed a limited power to tax and control.[12] This has been so, even though the legal entity engaged in commerce between the states was itself created by Congress.[13] Without attempting to bound this state power meticulously, we may say that two general rules have been followed: (1) the *property* as distinguished from the *operation* of persons in interstate commerce may be taxed; (2) such persons are subject to reasonable local control, *i. e.* reasonable state regulations concerning the public safety, health, and morals. If we accept the suggestion of the Chief Justice, what are to be the governing principles when the vehicle of interstate commerce is the United States?

It is fundamental that property owned by the federal government is not taxable by the states.[14] Taxation of privately owned property in the possession of the federal government is found in the case of property in the hands of receivers appointed by the federal courts and therefore regarded as in the possession of the court. In such case, however, federal possession is had on behalf of private litigants, not to secure the execution of public functions. Moreover, the tax cannot be enforced against the property in the receiver's custody without the consent of the court.[15] So far as the difficulty of enforcing state taxes is concerned it would be as great in the case of federal possession as in the case of

[11] See 2 TIEDEMAN, STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY, § 217. See also Victor Morawetz, "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations," 26 HARV. L. REV. 667, 678.

[12] See M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 436 (1819). See also 22 HARV. L. REV. 437; 26 HARV. L. REV. 78; 28 HARV. L. REV. 93; 23 HARV. L. REV. 643.

[13] Railroad Company *v.* Peniston, 18 Wall. (U. S.) 5 (1873). See Frederick H. Cooke, "State and Federal Control of Corporations," 23 HARV. L. REV. 456.

[14] Van Brocklin *v.* State of Tennessee, 117 U. S. 151 (1886); Wisconsin Railroad Co. *v.* Price County, 133 U. S. 496, 504 (1889). See JUDSON ON TAXATION, § 21.

[15] See HIGH ON RECEIVERS, 4 ed., § 59.

federal title. Consequently, unless the states are expressly authorized to tax, possession alone by the United States should remove interstate commerce from local taxation.[16]

On the other hand, the federal government's ownership of lands within the states does not *ipso facto* withdraw such property from the local police power.[17] It seems to be the rule that the police power persists until the state cedes its jurisdiction to the central government.[18] This power of police, however, is brought to bear only on private persons; it seems never to have circumscribed the power of the United States. As in the case of interstate commerce privately carried on, the state has police powers incidental to its territorial jurisdiction. When these powers reach the point of interfering with the *means* used by the United States to attain the ends of its government, they cease.[19] When the United States elects to operate the agencies necessary to obtain these ends with its own hands, it is arguable that the property taken over becomes more of a *means* of governmental operation than it was under private control. At all events, local regulation of the property now becomes a direct interference with the governmental operation of the United States, whereas before the interference was only indirect. This is as incompatible with the supremacy of the federal government within its sphere as is taxation of its property.[20] To require a sovereign to fence his right of way or to forbid him to carry freight on Sunday is to impose a restraint as inconsistent with his character as a tax on his assets within a given radius. This leads to the conclusion that the states cannot, without the express consent of Congress, tax or regulate property in the possession of the United States when engaged in interstate commerce.

RIGHT OF PUBLIC SERVICE COMPANY OR STATE COMMISSION TO ALTER RATES FIXED BY CONTRACT. — II. The recent unprecedented increase in the costs of labor, materials, and capital has brought before the public utilities of the country the difficult legal question whether they may lawfully increase the prevailing low utility rates above a maximum fixed in unexpired long-term rate contracts with their patrons,[1] or in municipal franchises under which they are oper-

[16] But see Henry Hall, "Federal Control of Railways," 31 HARV. L. REV. 860, 867. The writer seems not to distinguish between taxation of instrumentalities of the federal government which are private persons, and taxation of private property operated by and in the possession of the federal authorities. In either case he thinks express exemption from state taxation necessary.

[17] United States *v.* Sutton *et al.*, 165 Fed. 253 (1908). See 22 HARV. L. REV. 456.

[18] See FREUND, POLICE POWER, § 85. See also 31 HARV. L. REV. 1164.

[19] M'Cullough *v.* Maryland, *supra*.

[20] The United States Supreme Court has upheld the imposition of internal revenue taxes on a state engaged in the liquor business on the grounds that this was not a governmental function and that state socialism should not be permitted to deprive the United States of its sources of income. South Carolina *v.* United States, 199 U. S. 437 (1905). These arguments will probably not prove so persuasive when the shoe is on the other foot. See 1 WILLOUGHBY ON THE CONSTITUTION, § 59; 19 HARV. L. REV. 286.

[1] Discussed in 32 HARV. L. REV. 74.